93-354

NO. ____, _____

_____

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

_____

WENDELL S. LOOMIS, Petitioner

VS.

WALLIS & SHORT, P.C., Respondent

_____

# PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

_____

# PETITION FOR WRIT OF CERTIORARI

_____

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the state court has jurisdiction to entertain and grant judgment to attorneys for their fees incurred in prosecuting a matter before the United States Bankruptcy Court.

2. Whether a sole officer,sole director, sole shareholder and major creditor of a debtor corporation can act as attorney for the debtor in a Chapter 11 proceeding.

3. Whether a Chapter 11 debtor corporation may appear in the Bankruptcy Court through its sole officer, sole director, sole shareholder, and major creditor who also happens to be an attorney.

4. Whether a corporate debtor can be unrepresented in Bankruptcy Court yet vicariously represented by attorneys representing a prohibited party.

5. Whether an attorney can appear in Bankruptcy Court and perform legal work for a Chapter 11 corporation debtor and not represent the Chapter 11 debtor.

6. Whether an attorney can claim fees for representing a debtor-in-possession from a sole officer, sole shareholder, creditor and attorney who is forbidden by law from representing the debtor, without filing a disclosure statement and making application therefor to the Bankruptcy Court.

## LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the Supreme Court of Texas.

Wallis & Short, P.C.

Olney Wallis

William A. Short

Bro & Ploch

Timothy Ploch

Wendell S. Loomis

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WENDELL S. LOOMIS, Petitioner

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# PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

## Opinion Below

The June 11, 1991, Judgment of the County Civil Court at Law Number Four and the October 22, 1992, opinion of the Fourteenth Court of Appeals of the State of Texas, which was affirmed by the Supreme Court of Texas by its denial of writ of error on April 14, 1993, and its denial of rehearing on May 18, 1993, is sought to be reviewed. The opinion of the Fourteenth Court of Appeals is unpublished and is reprinted in the separate Appendix B to this Petition. This Petition for Certiorari is filed within 90 days of the date of said denial.

## Concise Statement of Grounds on which Jurisdiction of this Court is Invoked

The June 11, 1991, Judgment of the County Civil Court at Law Number Four and the October 22, 1992, opinion of the Fourteenth Court of Appeals of the State of Texas, which was affirmed by the Supreme Court of Texas by its denial of writ of error on April 14, 1993, and its denial of rehearing on May 18, 1993, is

sought to be reviewed. The opinion of the Fourteenth Court of Appeals is unpublished and is reprinted in the separate Appendix B to this Petition. This Petition for Certiorari is filed within 90 days of the date of said denial.

The jurisdiction of this Court is invoked under 28 USCS § 1257.

**Constitutional Provision involved in this Case:**

Supremacy Clause: U.S. Constitution, Article VI, Cl. 2.

The Constitutional Provision involved in this case is Article VI, Clause 2, of the United States Constitution. This clause states as follows:

> Clause 2. Supreme Law.
> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

**Statutory Law involved in this case:**

(1) Bankruptcy Code and Rules:
11 USCS § 101, et seq.

The lower courts have drawn in question and consideration the Bankruptcy Laws and Rules of the United States and held against their validity and applicability to the facts of this case.

The Sections and Rules of Bankruptcy Laws of the United States which have been misconstrued or overlooked by the Courts of the State of Texas are as follows:

11 USCS § 101(14)
"disinterested person" means person that-
(A) is not a creditor, an equity security holder, or an insider;
(D) is not and was not within two years before the date of filing of the petition a director, officer, or employee of the debtor or of an investment banker specified in subparagraph (B) or (C) of this paragraph; and
(E) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker specified in subparagraph (B) or (C) of this paragraph, or for any other reason;

11 USCS § 101(31)(B)
"insider" includes--
(B) if the debtor is a corporation--
(i) director of the debtor;
(ii) officer of the debtor;
(iii) person in control of the debtor;

11 USCS § 327. Employment of professional persons
(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title [11 USCS §§ 101 et seq.].

11 USCS § 329. Debtor's transactions with attorneys
(a) Any attorney representing a debtor in a case under this title [11 USCS §§ 101 et seq.], or in connection with such a case, whether or not such attorney applies for compensation under this title [11 USCS §§ 101 et seq.], shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

11 USCS § 330. Compensation of officers
(a) After notice to any parties in interest and to the United States trustee and a hearing, and subject to sections 326, 328, and 329 of this title [11 USCS §§ 326, 328 and 329], the court may award

to a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title [11 USCS § 327 or 1103], or to the debtor's attorney--

(1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney, as the case may be, and by any paraprofessional persons employed by such trustee, professional person, or attorney, as the case may be, based on the nature, the extent, and the value of such services, the time spent on such services, and the cost of comparable services other than in a case under this title [11 USCS §§ 101 et seq.]; and

(2) reimbursement for actual, necessary expenses.

11 USCS Rule 2014. Employment of Professional Persons

(a) APPLICATION FOR AN ORDER OF EMPLOYMENT. An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts, showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest,

their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

11 USCS Rule 2016. Compensation for Services Rendered and Reimbursement of Expenses

(a) APPLICATION FOR COMPENSATION OR REIMBURSEMENT. An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expend and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of

lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other entity. Unless the case is a chapter 9 municipality case, the applicant shall transmit to the United States trustee a copy of the application. (b) DISCLOSURE OF COMPENSATION PAID OR PROMISED TO ATTORNEY FOR DEBTOR. Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 15 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee within 15 days after any payment or agreement not previously disclosed.

11 USCS Rule 2017. Examination of Debtor's Transactions with Debtor's Attorney

(a) PAYMENT OR TRANSFER TO ATTORNEY BEFORE ORDER FOR RELIEF. On motion by any party in interest or on the court's own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property by the debtor, made directly or indirectly and in contemplation of the filing of a petition under the Code by or against the debtor or before entry of the

order for relief in any involuntary case, to an attorney for services rendered or to be rendered is excessive.

(2) Federal Law of Judiciary and Judiciary Procedure:

It is long settled law that a corporation must be represented by an attorney.

> 28 USCS § 1654. Appearance personally or by counsel
> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein. (June 25, 1948, ch 646, § 1, 62 Stat. 944; May 24, 1949, ch 139, § 91. 63 Stat. 103.)

**Statement of Case**

After a trial, without the aid of a jury, the County Court at Law Number Four of Harris County, the state of Texas, rendered judgment against WENDELL S. LOOMIS, individually, as follows:

| | |
|---|---|
| $23,177.08 | Fees to WALLIS & SHORT, P.C. |
| $16,868.75 | Fee for its attorney Ploch |
| $ 7,500.00 | Fee for its attorney Ploch in the event of an appeal. |
| $ 3,394.71 | Pre-judgment interest. |
| $50,940.54 | Total |
| | Post-judgment interest from June 11, 1992, to date. |
| | Court Costs |

The judgment was based upon the contention that WALLIS & SHORT, P.C. represented WENDELL S. LOOMIS and WENDELL S. LOOMIS represented the debtor-in-possession in the Bankruptcy Court.

The attorneys of Appellee, WALLIS & SHORT, P.C., were retained by WENDELL S. LOOMIS, Appellant, as Chief Executive Officer of debtor corporation LOOMIS & McKENNEY, P.C., to represent the professional corporation before the Bankruptcy Court in a Chapter 11 proceeding. Appellant was Chief Executive Officer for the professional corporation LOOMIS & McKENNEY, P.C., the debtor-in-possession, and was also sole officer, sole director, sole shareholder and a major creditor.

The Appellee, WALLIS & SHORT, P.C., was a professional corporation existing under the laws of the state of Texas composed of attorney OLNEY WALLIS and attorney WILLIAM A. SHORT.

The attorneys of WALLIS & SHORT, P.C., did perform various services before the Bankruptcy Court on behalf of the debtor corporation but later withdrew and another attorney was retained to complete the proceeding which resulted in dismissal, all matters having been settled, there was, therefore, no reason to continue.

After the dismissal, the Appellee, WALLIS & SHORT, P.C., claimed WENDELL S. LOOMIS, individually, had retained them to represent him while he represented the corporate debtor. There was no written agreement.

Appeal was timely taken to the Fourteenth Court of Appeals which affirmed the trial court by its opinion of October 22, 1992. This opinion contains additional findings and conclusions. (Appendix B) A Motion for Rehearing was overruled. (Appendix C)

Application for Writ of Error was timely taken to the Supreme Court of Texas (Appendix A). The Application was denied and the Motion for Rehearing was overruled (Appendix A). The Supreme Court on May 18, 1993, made the following statement:

> . . .the Court having determined that the application, as amended, presents no error of law which is of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals, it is ordered that said application, as amended, be and hereby is, denied.
> . . .
> Petitioner's motion for rehearing of application for writ or error having been duly considered, it is ordered that said motion be, and hereby is, overruled. (Emphasis added.)

This order overruling the motion for rehearing constitutes total exhaustion of state remedies in the courts of the state of Texas and there is no other avenue available to Appellant except through this application for writ of certiorari.

## Federal Questions

The Federal questions to be reviewed herein were first raised by argument in the trial court. The Federal questions were submitted to the Fourteenth Court of Appeals as Appellant's First Point of Error (see Opinion of Court Appendix B at page 11) The Federal questions were submitted to the Texas Supreme Court by Application for Writ of Error and Brief in support thereof.

## Reasons for Granting the Writ

Certiorari should be granted to preserve the supremacy of the Bankruptcy Laws of the United States and to correct a grave injustice to Petitioner.

## Pre-emption

> When state law is preempted by Federal Law, Federal Law controls. Any claim that is within a preempted area of law raises a Federal question and is removable.

Avco Corp. v. Aero Lodge, (1968) 88 S.Ct. 1235, 390 U.S. 557, 20 L.Ed.2 126.

Franchise Tax Board v. Construction, (1983) 103 s.Ct. 2841, 2853-54, 463 U.S. 1, 77 L.Ed.2 420

Proper construction of the Bankruptcy Act precludes a State Court from taking jurisdiction of a matter involving Bankruptcy law. Acme Harvester Co. V. Beekman Lumber Co., (1911) 222 U.S. 300, 56 L.Ed. 208, 32 S.Ct. 96.

Opinion of the Lower Courts

At issue in this case is the jurisdiction of a state court to render judgment over matters and proceedings occurring in the United States Bankruptcy Court under the laws and procedures of the Bankruptcy Code of the United States.

Additionally, in construing the Bankruptcy Code, the lower courts held directly contrary to the Bankruptcy Code 11 USCS §§ 327(a), 329, and other provisions as hereinafter set forth. The state courts have held that an attorney who was unqualified, represented the debtor-in-possession and an otherwise qualified attorney represented him, an impossible situation.

The most objectionable statement contained in the opinion of the Fourteenth Court of Appeals (p.12) is that 11 USCS §

329(a)(supp. 1992) refers only to an attorney representing the debtor. The court states:

> This section, by title and in its specific language, refers only to an attorney representing the debtor. Since we have already determined that the trial court correctly found that Wallis & Short represented Loomis individually, this section has no bearing on this case. Loomis makes much of the phrase "or in connection with such a case." He seems to argue that this would apply to any attorney representing any party in the bankruptcy or a matter connected to the bankruptcy. A plain reading of the statute belies this assertion. The section clearly refers to an attorney representing the **debtor** in the bankruptcy or representing the **debtor** in a case connected to the bankruptcy. We refuse to strain the language of the statute to suit Loomis' purpose. (Emphasis added.)

Corporation Must Have Attorney

It is axiomatic and surely beyond contention that a corporation must be represented in a court of law, including Bankruptcy Court, by an attorney. 28 USCS § 1654

Illustrative case construing this statute is as follows:

National Independent Theater Exhibitors, Inc. v. Buena Vista Distribution Co. (1984, CA11 Ga) 748 F2d 602, 1984-2 CCH Trade Cases

para. 66311, 40 FR Serv 2d 954, reh den, en banc (CA11 Ga) 755 F2d 176 and cert den 471 US 1056, 85 L Ed 2d 484, 105 S Ct 2120.

Attorney Must Be Qualified

An attorney representing a debtor-in-possession must be qualified under the Bankruptcy Code.

Recently a Bankruptcy Court construed this very situation in holding:

> No corporation may appear in bankruptcy pro se, including an attorney's professional corporation in which the attorney is the sole shareholder. In re Thomas J. Turner, III, Law Offices, P.C. Debtor, (B.C. E.D. Pa. Feb., 24, 1993) 23 B.C.D. 1746.

The attorney must be a "disinterested person" and may not be an "insider." Judge Cannon, in his opinion misconstrued the following Bankruptcy Code sections:

1. 11 USCS § 101(14)(A)(D)(E) - "disinterested person"
2. 11 USCS § 101(31)(B)(F) - "Insider"
3. 11 USCS § 327(a)
   11 USCS § 329(a)
   11 USCS § 330
   11 USCS Rule 2014
   11 USCS Rule 2016(a)(b)
   11 USCS Rule 2017 "payment for services in any way related to the Bankruptcy Case"

For this opinion to stand, each of these statutes would be altered for this case alone at the behest of this state judge.

"Disinterested Person"

11 USCS § 101(14) Defines a "disinterested person":

> "disinterested person" means person that
> (A) is not a creditor, an equity security holder, or an insider;
> (D) is not and was not within two years before the date of filing of the petition a director, officer, or employee of the debtor . . . ; and
> (E) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor . . .; 11 USCS § 101(14)(A)(D)(E)

"Insider"

11 USCS § 101(31)(B) defines an "insider":

> "insider" includes--
> (B) if the debtor is a corporation--
> (i) director of the debtor;
> (ii) officer of the debtor;
> (iii) person in control of the debtor; . . . 11 USCS § 101(31)(B)

The reasoning behind the law precluding an "insider" from being an attorney for a Chapter 11 debtor-in-possession is that the debtor has all the powers and duties of a

trustee. As such the attorney for debtor must be a disinterested person, otherwise the "debtor-in-possession" concept of the Bankruptcy Code would not work. The debtor's officers would be tempted to favor their own interests over that of creditors, or would surely be accused of wrong doing whether true or not. They would not meet the test of appearance of impropriety.

Professionals

Bankruptcy Code 11 USCS § 327(a) provides for the employment of professionals by the trustee (read: "debtor-in-possession", 11 USCS § 1107) with the court's approval. This specifically provides that these professionals may not "hold or represent an interest adverse to the estate." They must be "disinterested persons."

The legislative history of 11 USCS § 327 says that the disinterestedness requirement was incorporated in the statute to prevent even the appearance of a conflict of interest

irrespective of the integrity of the person or firm under consideration. [11 USCS § 327: H. Rept. No. 95-594 to accompany H.R. 8200, 95th Cong., 1st Sess. (197) p. 328].

Application to Case at Hand

Of course LOOMIS, as sole officer, sole director, sole shareholder, major creditor, and attorney, could not, under any circumstances, as a matter of law, represent the corporate debtor-in-possession in a Chapter 11 proceeding in the Bankruptcy Court. Under the facts of this case, as recited in the findings by Judge Cannon, the corporate debtor is left without an attorney.

WENDELL S. LOOMIS, Appellant, who was (erroneously) found to have represented the corporation before the Bankruptcy Court was all of the above. He was an "insider" and he was not a "disinterested person".

The opinion of Judge Cannon is, at best, a slanderous denunciation of a senior member of the Bar of the State of Texas and of the

Courts of the United States including this Court (admitted 1977). It is hoped that the opinion will be read objectively and the derogatory innuendos and accusations be ignored. To allow this clearly erroneous holding to continue is a travesty against Appellant. It is a poor reward for 34 years of hard and loyal work.

The Honorable R.F. Wheless, Bankruptcy Judge in the Houston Division, stated under oath that "Loomis was represented individually by Wallis & Short specifically Bill Short, and Loomis represented the debtor." (Opinion, Appendix B, p.8) Obviously Judge Wheless was mistaken as to this conclusion as it would be, and is, contrary to law. As Loomis could not represent the debtor, the debtor would be left without representation by an attorney and, as debtor was a corporation, it could not proceed in Bankruptcy Court.

Therefore the holding of the lower courts that Appellant WENDELL S. LOOMIS represented the debtor could never be, the statement of

Bankruptcy Judge Randolph Wheless to the contrary notwithstanding. Judge Wheless and Judge Cannon were simply mislead and/or mistaken.

In the instant case WENDELL S. LOOMIS, Appellant herein, was precluded as a matter of law from representing the corporate debtor and therefore the fiction that WENDELL S. LOOMIS represented the corporation before the Bankruptcy Court and WALLIS & SHORT, Appellee, represented WENDELL S. LOOMIS, simply can not happen. In a Chapter 11 proceeding, the debtor-in-possession is the trustee and owes a duty to the court and to the creditors. By virtue of 11 USCS § 1107(a), a Chapter 11 debtor-in-possession is subject to all the duties of a trustee under the Code. A trustee, pursuant to 11 USCS § 327(a) may only retain a disinterested person to represent him as an attorney. An "insider" would have a conflict of interest. So, too, the debtor-in-possession in a Chapter 11 case may not be represented by an "insider" attorney.

Actually, the situation was the other way around. Wallis & Short represented the debtor and Loomis represented his own interests which involved his right to file the proceeding in the first place, his status as sole officer, sole director, sole shareholder, and major creditor of the debtor.

There was not one shred of evidence that WALLIS & SHORT did or performed one act or thing for LOOMIS in his individual capacity. All the references in the record cited by Judge Cannon make the assumption that LOOMIS needed individual representation and that the corporation could somehow get along in the Federal Bankruptcy Court without a qualified attorney. It is uncontroverted that LOOMIS was an "insider." As an insider he could not, as a matter of Bankruptcy Law, represent the corporate debtor in a Chapter 11 proceeding. There was no other attorney for the debtor present before the Bankruptcy Court than MR. WILLIAM SHORT.

Judge Cannon makes much of the fact that LOOMIS was a stockholder and officer and director of corporate debtor and he declares this to be sufficient individual interest to find individual representation by Appellee. But this could be true of anybody who owns stock in a corporation and depends upon the corporation for his livelihood. However, it is this very fact, the "insider" status of the Appellant, that proves the point. WENDELL S. LOOMIS could not, as a matter of law, be the attorney for the debtor-in-possession!

At page 23 of Judge Cannon's opinion (Appendix B, p.23), the Judge (not known as having much to do with Bankruptcy Law) asserts that 11 USCS § 327(a) does not apply because it applies to professionals representing the estate and not to professionals representing individuals before the Bankruptcy Court. This is fallacious because this would leave the debtor corporation without professional representation - an impossible situation and contrary to the Bankruptcy Law.

Attorney Fees for Debtors in Bankruptcy

Perhaps Judge Cannon was aware that MR. WILLIAM SHORT could not obtain a fee from the bankruptcy case.

> Without approval pursuant to 11 USCS § 327 and 11 USCS Rule 2014, professionals rendering services to debtors are considered volunteers and cannot receive compensation for their services. Re Fountain Bay Mining Co. (1985 BC WD Va.) 46 BR 122.
>
> 11 USCS § 330-Compensation of officers
>
> 11 USCS § 2016- Compensation for Services Rendered and Reimbursement of Expenses
>
> 11 USCS Rule 2017.-Examination of Debtor's Transactions with Debtor's Attorney

It may be regrettable that MR. SHORT neglected to file his disclosure statement. It may also be regrettable that MR. SHORT chose to withdraw before the case was concluded. MR. SHORT was the bankruptcy attorney and it must be presumed that he knew what he was doing. He should not be allowed to change his mind and seek the assistance of the courts to bail him out.

## Conclusion

The Supreme Court of the State of Texas has in effect confirmed and refused to reconsider an opinion of a lower Court affirming a judgment of a trial court which judgment wholly ignores the Supremacy Clause of the U.S. Constitution and purports to construe the Bankruptcy Code contrary to holdings of the U.S. Supreme Court and of the U.S. Courts of Appeal and the Bankruptcy Courts.

The attorneys for the Appellee and the lower courts have built a case which appears very sound under State law, however they have built it 10 feet in the air and without a foundation. Just as a building cannot stand without a foundation, so also this case cannot stand without the answer to the question: "Who represented the debtor corporation in the Bankruptcy Court?" The answer is that WILLIAM SHORT was the attorney for the debtor and not the attorney for appellant.

The Supreme Court of Texas was too busy to look at this decision which, in practical effect, has ruined the Petitioner, Appellant below. It is submitted that that court and this Court under the undisputed facts, could and should reverse and render the judgment in favor of Petitioner and declare it to be wrong and in violation of the law of these United States.

The point of all this is that some very skillful attorneys have perverted the law and have deceived and defrauded the Courts. There is no other case in the entire United States holding that a State can decide attorney's fees incurred in a Bankruptcy Court or that an "insider" can represent a Chapter 11 debtor-in-possession through the use of third party attorneys who, in turn, would have no responsibility to the Bankruptcy Court.

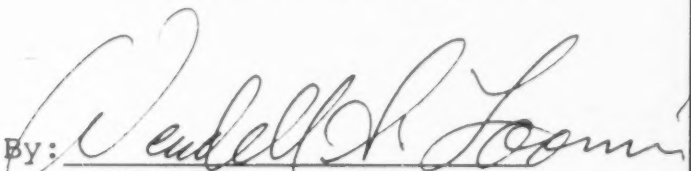
**Prayer**

For the foregoing reasons, the petitioner respectfully prays that its petition for a writ of certiorari be granted and that the

judgment of the state courts be set aside and vacated. Petitioner suggests that oral hearing hereon may not be necessary as the facts and law are clear and uncontroverted. The rulings of the lower courts, on their face are clearly wrong and should be summarily set aside, reversed and rendered.

RESPECTFULLY SUBMITTED this the 16th day of August, 1993.

WENDELL S. LOOMIS, P.C.

By: 

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**APPENDIX A**

**IN THE SUPREME COURT OF TEXAS**

-- -- -- --

| | | |
|---|---|---|
| NO. D-3286, | ) | April 14, 1993 |
| | ) | |
| WENDELL S. LOOMIS | ) | |
| | ) | |
| VS. | ) | From HARRIS County, |
| | ) | 14th District |
| WALLIS & SHORT, P.C. | ) | |

Application of petitioner for writ of error to the Court of Appeals for the Fourteenth District, together with petitioner's motion for leave to amend said application, filed herein on February 22, 1993, having been duly considered, it is ordered that said motion for leave be granted, and the Court having determined that the application, as amended, presents no error of law which is of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals, it is ordered that said application, as amended, be and hereby is, denied.

It is further ordered that applicant, Wendell S. Loomis, and surety, Nicholson G.

Tras (sic), pay all costs incurred on this application.

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| NO. D-3286, | ) | May 18, 1993 |
| | ) | |
| WENDELL S. LOOMIS | ) | |
| | ) | |
| v. | ) | From HARRIS County, |
| | ) | 14th District. |
| WALLIS & SHORT, P.C. | ) | |

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

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Affirmed and Opinion filed October 22, 1992.

(Seal of State of Texas)

In The
Fourteenth Court of Appeals

NO. B14-91-00821-CV

WENDELL S. LOOMIS, Appellant
V.
WALLIS & SHORT, P.C., Appellee

On Appeal from the
County Civil Court at Law No. 4
Harris County, Texas
Trial Court Cause No. 544,933

**OPINION**

Following a non-jury trial on a suit to recover for unpaid attorneys' fees, the trial court granted judgment in favor of Wallis & Short, P.C., appellee. Appellant Wendell S. Loomis (Loomis) brings twenty-two points of error alleging the judgment rendered by the trial court was erroneous. We affirm.

On January 16, 1987, Loomis & McKenney, P.C. filed a petition for a Chapter 11 Proceeding in Reorganization in the bankruptcy court. The petition was filed by Loomis, a partner in the firm. This filing was contested by three attorneys employed by the

corporation: Hugh McKenney, Joel L. Jesse, and Raymond Loomis.[1] These attorneys claimed that Loomis had no authority to file the bankruptcy. There was little progress made in the case until the next year. On February 5, 1988, Loomis went to the offices of Wallis & Short, P.C.. At this meeting, Loomis met with Olney Wallis and Bill Short, partners in Wallis & Short, P.C., and discussed hiring the firm to handle the matters pending before the bankruptcy court. The parties agreed that the firm would be paid one hundred and twenty-five dollars per hour ($125.00). This agreement was never reduced to writing. Loomis paid the firm a retainer and expense money out of his personal funds.

Appellee set up a file in the name of Wendell S. Loomis, and the firm billed Loomis individually. Appellee undertook the bankruptcy case and began billing Loomis. Most of the work was done by Mr. Short, though

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[1] Raymond Loomis is not related to appellant.

Mr. Wallis was also involved. Wallis & Loomis actually worked on the case for approximately eight months. The firm formally withdrew from the case on December 9, 1988. Substantial bills accrued over that time. Loomis paid some of the money owed, and the money was paid out of his personal account. Loomis was billed a total of $31,565.33. He paid $8,388.25, leaving a balance due and owing of $23,177.08. Appellee sent numerous letters to Loomis demanding payment. Loomis failed to pay, and thereafter, appellee retained counsel to recover the past due attorneys' fees. After a bench trial, the trial court granted judgment in favor of appellee for $23,177.08 plus $16,868.75 in attorneys' fees in the trial court, $7,500.00 in attorneys' fees in the event of an appeal, $3,394.71 in prejudgment interest, and postjudgment interest. The trial court filed findings of facts and conclusions of law in support of its judgment. Appellant brings this appeal.

In points of error two through five and ten through fourteen, appellant contends that there was no evidence or insufficient evidence to support the trial court's findings as to whom Wallis & Short represented in the bankruptcy matter. Wallis & Short claimed that it represented Loomis individually. Loomis claimed that the firm was hired to represent the debtor, Loomis & McKenney, P.C. The trial court found that Wallis & Short represented and performed work on behalf of Loomis individually. While these nine points of error are couched in various ways, they all hinge on whether there was sufficient evidence to find that Wallis & Short represented Loomis individually and whether services were rendered to Loomis in his individual capacity.

Findings of fact, in a case tried to the court, have the same force and dignity as a jury's verdict upon jury questions. City of Clute v. City of Lake Jackson, 559 S.W.2d 391, 395 (Tex. Civ. App.--Houston [14th Dist.] 1977, writ ref'd n.r.e.). However, when a

complete statement of facts appears in the record, the findings of fact are not conclusive. Middleton v. Kawasaki Steel Corp., 687 S.W.2d 42, 44 (Tex. App.--Houston [14th Dist.] 1985), writ ref'd n.r.e. per curiam, 699 S.W.2d 199 (Tex. 1985). A trial court's findings of fact are reviewable for legal and factual sufficiency of the evidence to support them, First Nat'l Bank v. Kinabrew, 589 S.W.2d 137, 146 (Tex. Div. App.--Tyler 1979, writ ref'd n.r.e.), by the same standard which are used to review jury findings. Okon v. Levy, 612 S.W.2d 938, 941 (Tex. Civ. App.--Dallas 1981, writ ref'd n.r.e.).

When "no evidence" and "insufficient evidence" points are raised on appeal, the appellate court must address the "no evidence point" first. Glover v. Texas Gen. Indem. Co., 619 S.W.2d 400, 401 (Tex. 1981). In reviewing a legal insufficiency or "no evidence" point, the appellate court must consider only the evidence and inferences, when viewed in the most favorable light,

tending to support the finding, and must disregard all evidence and inferences to the contrary. Davis v. City of San Antonio, 752 S.W.2d 518, 522 (Tex. 1988); Stafford v. Stafford, 726 S.W.2d 14, 16 (Tex. 1987). If there is any evidence of probative force to support the finding, the point must be overruled. Sherman v. First Nat'l Bank, 760 S.W.2d 240, 242 (Tex. 1988).

During the trial, Wallis & Short called a number of witnesses on the issue of whom the firm represented during the bankruptcy. The first witness called was Olney Wallis. Wallis testified that he and Bill Short met with Loomis at the offices of Wallis & Short in February of 1988. Wallis stated that during that meeting an oral agreement was made under which Wallis & Short would represent Loomis in the bankruptcy. Wallis stated no less that five times during the trial that the agreement was to represent Loomis individually. Further, he gave reasons as to why Loomis would need individual representation when he

was not the bankruptcy debtor. He stated that there was an argument about who were the actual shareholders in the corporation. The three associates in the firm alleged that Loomis was not the sole shareholder and had no right to place the corporation into bankruptcy, and those associates had in fact filed a motion to dismiss. Wallis testified that Loomis had a personal or individual interest in the bankruptcy because he had an interest in the client files, the furniture, an outstanding bank note that Loomis had personally guaranteed, and certain accounts receivable. Wallis claimed that Loomis was very frustrated because he did not have possession of the physical assets of the firm, nor did he have access to the client files. Wallis stated that Loomis needed representation to have those items returned to his control. Wallis went on to sum up by saying the Loomis was "a client in need of a lawyer."

There was further evidence given by Wallis that supports the finding that Wallis & Short were representing Loomis individually. Wallis testified that the firm set up a client file with a New File Information Sheet. This information sheet was introduced into evidence. On that sheet, under the phrase "our client" was the name "Wendell Loomis." The sheet also noted an hourly rate of payment at $125.00 per hour. When payment was discussed at the February 5th meeting, Loomis stated that while he was currently short on cash because of the bankruptcy situation, he would be able to make up any payment deficiencies out of a personal injury case. He told Wallis and Short that he was involved in a car accident and expected to recover funds from an insurance claim. Wallis' testimony and Plaintiff's exhibits 1-14 showed that Loomis was billed as an individual. The evidence also showed that the payments that were made, were paid by Loomis with personal checks.

Throughout his direct testimony and during cross-examination by Loomis[2], Wallis stated time and time again that Wallis & Short represented Loomis individually, Loomis was not the debtor, and Loomis did have an interest in the bankruptcy as an individual. The most damning evidence came from Loomis himself during his cross-examination of Wallis. When questioned by the court as to whether he had any interest in the bankruptcy, Loomis replied:

> Well, I had an interest in the bankruptcy estate, Your Honor, as an individual, yes, as a stockholder. But we're talking about a bankruptcy estate. I'm not talking about comparable interest or an interest in which I was not legally entitled.

These statements show that Loomis himself believed that he had an individual interest in the bankruptcy matter to which he was legally entitled. It is not hard to believe that he

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[2] Loomis represented himself throughout most of the trial, despite words of caution from the trial court.

would wish to have counsel to protect that individual interest.

This evidence alone is enough to defeat the legal sufficiency challenge brought by appellant. The testimony by Wallis constitutes more than the scintilla of evidence required by law to surmount a "no evidence" challenge. See Kindred v. Con/Chem, Inc., 650 S.W.2d 61, 63 (Tex. 1983). However, the appellee presented more than just the testimony of Wallis. The appellee also called Bill Short to the stand. He was at the February 5th meeting with Loomis. In fact, he testified, as did Wallis, that he is the attorney who handles most of the bankruptcy matters for Wallis & Short. Therefore, he would do most of the work for Loomis. Short reiterated the testimony given by Wallis that Wallis & Short were hired by Loomis for individual representation. He testified that the first time he ever heard Loomis claim differently was in his answer to the lawsuit. He stated that he was there when the fee

arrangement was discussed and agreed with Wallis that the fee was to be $125.00 per hour. Short testified that Loomis was in fact given a discount rate as a professional courtesy. The normal fee would be $150.00 per hour. He also stated, as had Wallis, that Loomis expected to receive as settlement from his car accident and would be able to pay his attorneys' fees from that settlement.

Short testified that when he was in bankruptcy court appearing on behalf of Loomis, he told the bankruptcy court that he was there for Loomis. At an earlier proceeding he incorrectly stated that he was there for Loomis & McKenney, P.C., but he explained that it was a logical slip because he normally does represent the debtor in these proceedings. This mistake was corrected on the record at the very next hearing. Short testified that Loomis was present when this took place and made no objection to the fact that Short told the court that he was there for Loomis and not the debtor. Numerous

exhibits were introduced during Short's testimony. A number of these were papers filed by Short during the bankruptcy. Whenever Short signed any of these papers he signed as attorney for Loomis. There were papers introduced into evidence that were signed by Loomis. These papers showed that Loomis was there on behalf of the debtor, not Short. In fact, Loomis entered into an Agreed Order on May 17, 1988, on which he signed off "Wendell S. Loomis, Attorney in Charge for Loomis & McKenney, P.C." This was during the time that Wallis & Short were involved in the case. If Wallis & Short represented the debtor, why was Loomis entering into agreements and filing papers on its behalf as the attorney in charge?

Short also testified that Loomis benefited from the representation. A settlement agreement was eventually signed on April 22, 1988. Short stated that the settlement was very favorable to Loomis because: (1) it dismissed the bankruptcy; (2)

it dismissed a state court suit concerning matters arising out of the bankruptcy; and (3) it required that certain assets be turned over to Loomis. When this agreement was breached by Loomis' former associates, Short spent a good deal of time in court forcing compliance. He was ultimately successful.

The appellee also called Bruce Tough to testify. Tough represented Loomis, McKenney & Jesse, P.C. in the same bankruptcy case. This firm was one formed by the former associates of Loomis & McKenney, P.C. after it was placed in bankruptcy by Loomis. Tough testified that it was his understanding throughout the case that Wallis & Short represented Loomis individually. He stated that there was never any question in his mind about this. He said that Short told him that he was representing Wendell Loomis. Further, Tough said he was in court the day that Short announced that he represented Loomis individually. He also testified that Loomis benefited from the representation provided by Wallis & Short. He

testified that he believed he was going to win the case until Wallis & Short became involved. He stated that in the settlement, Loomis got approximately $50,000.00 in goods, money from a bank account, certain accounts receivable, certain client files, and an agreement that the name Loomis, McKenney & Jesse, P.C. was to be changed so that Loomis did not appear first. Tough testified that this settlement was very favorable to Loomis.

There was also testimony by Henry Raymond Strouby, an attorney in the bankruptcy section at Akin, Gump, Strauss, Hauer & Feld. He testified as an expert on behalf of appellee. He stated that his review of the pleadings filed in the bankruptcy matter lead him to the conclusion that Loomis was the attorney for the debtor and Wallis & Short were working on behalf of Loomis individually. He further stated that as a party in interest, Loomis was entitled to individual representation if he wanted it.

Finally, the appellee called Judge Randolph Fredrick Wheless, Jr., a United States Bankruptcy Judge for the Southern District of Texas, by videotape, to testify as a fact witness. Judge Wheless was the judge who was in charge of the Loomis & McKenney, P.C. bankruptcy. Judge Wheless stated that Loomis was represented individually by Wallis & Short, specifically Bill Short, and Loomis represented the debtor. He testified that on at least one occasion, Short announced in open court that he represented Loomis individually. He agreed with the other witnesses that Loomis was present when this occurred and never objected or otherwise complained. He said on direct examination and on cross-examination that he believed Loomis required individual representation because of the questions as to whether he had the authority to place Loomis & McKenney, P.C. in Chapter 11 bankruptcy, and whether he was the sole shareholder. The judge testified that these issues were contested by Loomis' former associates.

Loomis argues that testimony by Judge Wheless was improper. He contends that it was erroneous to allow the bankruptcy judge to testify as an expert. Loomis' basic assumption is incorrect. Judge Wheless was called as testified as a fact witness. It was not improper to allow him to testify.

It is clear that there is more than a mere suspicion or surmise as to whether Wallis & Short represented Loomis individually. The evidence overwhelmingly demonstrates that appellee represented Loomis as an individual and did not represent the debtor corporation. Appellant's "no evidence" challenge fails as to points two through five and ten through fourteen.

If an appellant brings both legal and factual sufficiency points and the legal sufficiency challenge fails, the appellate court must then review the factual sufficiency challenge. Glover, 619 S.W.2d at 401. Here, appellant's legal sufficiency challenge has

failed; we must now review the evidence for factual sufficiency.

In reviewing a factual sufficiency challenge, the appellate court must consider, weigh, and examine all of the evidence. Plas-Tex, Inc. v. United States Steel Corp., 772 S.W.2d 442, 445 (Tex. 1989); Lofton v. Texas Brine Corp., 720 S.W.2d 804, 805 (Tex. 1986). In weighing "all of the evidence," the court must consider evidence which supports and which is contrary to the challenged finding. Id. Once this is done, the appellate court should set aside the finding only if the evidence is too weak to support the finding or if the finding is so against the great weight and preponderance of the evidence that it is manifestly unjust and clearly wrong. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Garza v. Alviar, 395 S.W.2d 821, 823 (Tex. 1965).

The evidence contrary to the trial court's finding that Wallis & Short represented Loomis individually was presented by Loomis. During cross-examination of

appellee's witnesses, Loomis was unable to get any of them to say the Wallis & Short represented the debtor. During his case in chief, Loomis called Nick Tratras to the stand. Tratras is an attorney who shares office space with Loomis. In fact, Loomis rents the space from Tratras. He testified that he drove Loomis to the meeting that was held on February 5th at the offices of Wallis & Short. He said that while he was there, he could not recall Loomis hiring Wallis & Short to represent him individually. He testified that in his opinion the visit to the office was made so that Loomis could hire Wallis & Short to represent the debtor in the bankruptcy matter. However, he also stated during direct examination that the bankruptcy would have had an effect on Loomis individually if he were the sole shareholder. During cross-examination, Tratras admitted that he only attended that one meeting, and that at that meeting a discounted rate of $125.00 per hour was set.

The other witness to appear on Loomis' behalf was Loomis himself. He testified that he met with Wallis and Short on February 5, 1988. He disputes the testimony by Wallis and Short that he hired their firm to represent him individually. He stated that he went there for the express purpose of hiring them to represent the debtor corporation. He said he could not represent the debtor because of a conflict of interest, as a shareholder and that he was in no shape to do so anyway because of injuries he sustained in the car accident. He testified the $125.00 per hour figure was agreed to; however, he said that the fee was to come from the bankruptcy estate upon Short making a proper application under the Bankruptcy Code. He testified that under the Bankruptcy Code, an attorney for the debtor is required to apply for his fee. He said that he paid the money out of his personal funds because Short requested the money up front, and that he expected reimbursement from the estate. He testified

that he told Short that he should go ahead and file with the court so that he would get paid out of the bankruptcy estate. He stated that he called this to Short's attention numerous times, but Short failed to properly apply for payment.

During later testimony, Loomis was asked if he kept time slips as to work be performed on the bankruptcy matter. He said that he did because he "was expecting at some point to be [sic] recoup some of my time and losses." He went on to say that he would apply to the bankruptcy court for this purpose, and that this was the procedure he was urging Short to follow. From this testimony a question arises: how could Loomis believe that he could recoup for his time and expenses through the procedure in the Bankruptcy Code unless he was representing a party in the suit?

The evidence in support of the trial court's finding was discussed in full under the "no evidence point." After reviewing all of this evidence, it is apparent that there is

overwhelming support for the trial court's finding that Wallis & Short represented Loomis individually. It is equally clear that Loomis had a personal interest in the bankruptcy and that he received a benefit from the representation provided by Wallis & Short. Appellant's points two through five and ten through fourteen are overruled.

In his first point of error, Loomis contends that the trial court erred in assuming jurisdiction because the subject matter of the suit involved attorneys' fees for services rendered to an estate in bankruptcy. Loomis argues that the trial court's assumption of jurisdiction is contrary to the Supremacy Clause of the United States Constitution and the Bankruptcy Code.

In support of his argument, Loomis cites numerous sections of the Bankruptcy Code. 11 U.S.C. 101, et al. (1979). Loomis is correct in his assertion that the bankruptcy court must give approval for the employment of a professional in a bankruptcy matter and that

the court has the power to review and adjust the professional's compensation. 11 U.S.C. 327(a)(1979); 11 U.S.C. 328(a)(Supp. 1992). These sections, however, clearly apply to professionals employed to represent the debtor, not a professional who simply represents an individual with a personal interest in the bankruptcy. Loomis cites other sections of the Code which basically repeat the mandates of 327(a) and 328(a). These too, are inapplicable.

Loomis places a great deal of emphasis on 11 U.S.C. 329(a)(Supp. 1992). This section is entitled "Debtor's transactions with attorneys," and states:

> Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

This section, by title and in its specific language, refers only to an attorney representing the debtor. Since we have already determined that the trial court correctly found that Wallis & Short represented Loomis individually, this section has no bearing on this case. Loomis makes much of the phrase "or in connection with such a case." He seems to argue that this would apply to any attorney representing any party in the bankruptcy or a matter connected to the bankruptcy. A plain reading of the statute belies this assertion. The section clearly refers to an attorney representing the **debtor** in the bankruptcy or representing the **debtor** in a case connected to the bankruptcy. We refuse to strain the language of the statute to suit Loomis' purpose.

Loomis also argues that because the debtor derived certain benefits from the representation given by Wallis & Short, that the sections of the Code must apply. It is often the case in multiple-party litigation

that an attorney for one party does an act that benefits another party. It is ludicrous to suggest that by virtue of this act he has somehow become the attorney for all parties who benefited. This reasoning is also faulty in that the Code provides that certain parties, with an interest in the case, are entitled to appear and be heard in the bankruptcy. 11 U.S.C. 1109(b)(1979). Loomis had such an interest as a shareholder, and since he is the one who placed the debtor in bankruptcy in the first place, it is only logical that his interest would be similar to that of the debtor corporation, and that certain acts performed by his attorney would likely benefit the debtor as well. This does not turn Wallis & Short into the debtor's attorney.

The sections of the Bankruptcy Code and the cases cited by Loomis are inapplicable to this situation because Wallis & Short represented Loomis, not the debtor corporation. The trial court properly assumed

jurisdiction over this suit for attorneys' fees. Appellant's first point of error is overruled.

In point of error six through nine, Loomis contends there was no evidence or insufficient evidence to find that he individually entered into an oral agreement for legal services with Wallis & Short or that there ever was such an agreement.

Using the standard cited above and the evidence discussed previously, these points must fail. We have already determined that the evidence was sufficient to prove that Wallis & Short represented Loomis individually. Thus, the only question remaining under these points is whether the evidence is legally and factually sufficient to support the finding that there was oral agreement between Loomis and Wallis & Short to perform legal services for Loomis at the rate of $125.00 per hour.

The evidence on this issue is overwhelming. Not only did Wallis and Short

testify that such an agreement was made, but so did the witnesses who testified for Loomis: Loomis and Tratras. Loomis testified that there was an agreement for representation at $125.00 per hour. His complaint during the trial was not about the existence of the agreement, but rather about who Wallis & Short were hired to represent. Tratras also testified that there was an agreement for representation at $125.00 per hour. Tratras even admitted that the rate discussed and agreed to was a discount rate. Like Loomis, the only difference in his testimony from that of Wallis & Short was as to who was to be represented by the firm. In view of this evidence, it is clear that there was an oral agreement between Loomis and Wallis & Short. The evidence showed that the agreement was for the firm to represent Loomis individually and bill him at the rate of $125.00 per hour. Appellant's point of error six through nine are overruled.

In points of error fifteen and sixteen, Loomis argues that the court erred in finding the $16,868.75 was a reasonable attorney's fee for services performed by the attorney for appellee in this litigation. He further complains that the court excluded certain evidence by which he might have challenged the reasonableness of the fee.

Mr. Ploch, the attorney for Wallis & Short, testified that he was familiar with the rates charged in Harris County and particularly with those charged for commercial litigation cases. He testified that his regular hourly rate is $155.00 per hour and that in his opinion such a fee is reasonable. He testified that he was the attorney in charge of the case from the inception and that he had performed all the necessary work on the case. He stated that the case was very complicated because of the underlying factual basis, and that the case became more difficult overtime because of the actions of Loomis. The determination of what constitutes

reasonable attorney's fees is within the province of the trier of fact and will not ordinarily be disturbed on appeal. Kosberg v. Brown, 601 S.W.2d 414, 418 (Tex. Civ. App.--Houston [14th Dist.] 1980, no writ). The evidence given by Ploch is legally and factually sufficient to support the trial court's award of attorney's fees. The contention that the trial court erred in not requiring Ploch to turn over his original time slips is without merit. Loomis has cited no authority for the proposition that an attorney is required to turn over his original time slips to the opposing party during cross-examination. Loomis did not request these slips during discovery, nor did he subpoena them. Further, Ploch did not use the time slips to testify from and he provided Loomis with a summary sheet which contained the same information as the slips themselves. The only thing absent from the summary was the time spend in trial, and Loomis was personally aware of how much time was spent there. In

order to obtain a reversal of judgment based upon error of the trial court in admission or exclusion of evidence, it must be shown that the trial court did in fact commit error, and that error was reasonably calculated to cause and probably did cause rendition of an improper judgment. Exxon Corp. v. Shuttlesworth, 800 S.W.2d 902, 906 (Tex. App.--Houston [14th Dist.] 1990, no writ). We cannot say that the trial court erred in its decision to withhold the original time slips from Loomis and to prevent him from admitting them into evidence. We have found no authority for the proposition that Loomis was entitled to those slips. However, even if an error was committed by the trial court, the error was not calculated to cause nor did it cause the rendition of an improper judgment. Loomis had access to the same information by virtue of the summary produced by Ploch. Appellant's points fifteen and sixteen are overruled.

In his seventeenth through nineteenth points of error, Loomis claims the trial court erred in awarding $7,500.00 in appellate attorney's fees for appellate work by counsel for Wallis & Short. Loomis contends that the evidence was legally and factually insufficient to support this finding, and that an award of this amount in the event of an appeal denied him access to the courts in violation of the due process clauses of the United States and Texas Constitutions.

Loomis is simply incorrect in his assertion that there was no evidence that $7,500.00 was a reasonable award for attorney's fees in the event of an appeal. Ploch testified that $10,000.00 would be a reasonable amount for appellate attorney's fees. He testified that this amount was reasonable because of the factual background of the case and the nature of the record. The amount of appellate fees requested was never rebutted by Loomis. Further, "[t]he trial court's own proceedings together with the fact

that it may take judicial notice of usual and customary fees constitutes some evidence to support the award of appellate attorney's fees." Gill Savings Ass'n v. Chair King, Inc., 797 S.W.2d 31, 32 (Tex. 1990). The evidence is legally and factually sufficient to support the trial court's finding. Points seventeen and eighteen are overruled.

Without citing any authority for his position, Loomis contends he has been denied access to this court, or has been hindered by the appellate attorney's fees awarded in this case. This argument is without merit considering the fact that Loomis is now before the court. He filed the appeal, paid for a transcript and a statement of facts, and filed a brief. Since Loomis is here, he could not have been denied his right to due process. Point of error nineteen is frivolous and is overruled.

In points of error twenty through twenty-two, Loomis contends that the trial court erred in making written findings that certain

witnesses were credible and others were not. The trial judge found that Loomis and Tratras, Loomis' only witnesses, were not credible, and that many of appellee's witnesses were credible. Loomis contends that such a finding is unnecessary, insulting to a member of the bar[3], and calculated to prejudice the appellate court against Loomis.

The trier of fact is the sole judge of the credibility of the witnesses and the weight to be given their testimony. Rego Co. v. Brannon, 682 S.W.2d 677, 680 (Tex. App.--Houston [1st Dist.] 1984, write ref'd n.r.e.). In this case, the trial court, as the trier of fact, was free to believe or disbelieve any of the testimony presented by any witness. In a case such as this, where it basically comes down to one witnesses' word over another, and the trial court finds in favor of one party and makes findings to that effect, he is impliedly finding that some witnesses were

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[3] Every witness who testified in this case was an attorney.

credible and some were not. The fact that the trial court put his findings in writing in this case makes no difference. The cases cited by Loomis in support of his argument do not aid his position. We have found no law in this state that prohibits the trial court from putting such a finding on the record. Lastly, the findings made by the court were not findings of perjury as suggested by Loomis in his brief. If that was true, the court would likely have sent a transcript of the case to the State Bar Disciplinary Committee or to the District Attorney's office. Appellant's points of error twenty through twenty-two are overruled.

Appellee brings one cross-point on appeal. The appellee contends that it is entitled to sanctions against appellant Loomis for filing a frivolous appeal.

Texas Rule of Appellate Procedure 84 authorizes a court of appeals to sanction an appellant if it determines that "an appellant has taken an appeal for delay and without

sufficient cause." Tex. R. App. P. 84. The rule requires two findings by the appellate court: (1) that the appeal was taken for delay; and (2) that the appeal was taken without sufficient cause. In determining whether delay damages should be imposed on appeal, the court must look at the case from the point of view of the advocate and determine whether he has a reasonable ground to believe that the case would be reversed. Exxon Corp., 800 S.W.2d at 908. Further, the rule for delay damages should be applied with prudence, caution and after careful deliberation. Id. While Loomis has been unsuccessful in this appeal, we cannot say that the appeal lacked any adequate basis. Appellee's sole cross-point is overruled.

The judgment of the trial court is affirmed.

/s/ Bill Cannon
Justice

Judgment rendered and Opinion filed October 22, 1992.
Panel consists of Justices Pressler, Murphy, and Cannon.
Do not publish - Tex. R. App. P. 90.

**APPENDIX C**

J. CURTISS BROWN
Chief Justice

MARY JANE SMART
Clerk

**FOURTEENTH COURT OF APPEALS**
**1307 San Jacinto, 11th Floor**
**Houston, Texas 77002**

PAUL PRESSLER
WILLIAM E. JUNELL
PAUL C. MURPHY
SAM ROBERTSON
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CORRECTED LETTER OF: November 19, 1992

Hon. Wendell S. Loomis
14610 Falling Creek Dr.
Houston, TX 77068

Hon. Timothy R. Ploch
Bro & Ploch
5442 Richmond Avenue
Houston, TX 7756

RE: CASE NO. 14-91-00821-CV
TRIAL COURT CASE NO. 544,933

STYLE: Loomis, Wendell S.
V: Wallis & Short, P.C.

Counsel:

Please be advised that, on this date, the Court OVERRULED appellant's(s') motion for rehearing in the above cause.

Further, application for writ of error, if any, must be submitted on or before Monday, December 21, 1992.

MARY JANE SMART, CLERK

BY:/s/ Charlie Mitchell
Chief Deputy